Supreme Court, U.S.
FILED

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No. ——

In The Supreme Court of the United States

October Term, 1993

Thomas Herrmann,
Petitioner,

v.

IUE AFL-CIO Pension Fund and Lloyd J. Hayes, Peter S. DiCicco, Sal T. Ingrassia, John S. Vozella, Clarence Ranallo, and Thomas F. Lynch as Trustees of the IUE AFL-CIO Pension Fund,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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50pp

QUESTIONS PRESENTED

A. Does Title IV of ERISA create a private right of action against persons not parties to a multi-employer plan or otherwise obligated by a duty under ERISA simply upon the allegation that those persons participated in a scheme the purpose of which was to evade or avoid withdrawal liability imposed under 29 U.S.C. § 1381?

B. Does Title IV of ERISA extend federal subject matter jurisdiction to include claims by a plan participant against transferees of an employer's assets which the participant alleges were transferred from the employer in an attempt to evade or avoid the employer's withdrawal liability?

PARTIES TO THE ACTION

Plaintiffs:

IUE AFL-CIO PENSION FUND

LLOYD J. HAYES as Truste of the IUE AFL-CIO Pension Fund

PETER S. DICICCO as Trustee of the IUE AFL-CIO Pension Fund

SAL T. INGRASSIA as Trustee of the IUE AFL-CIO Pension Fund

JOHN S. VOZELLA as Trustee of the IUE AFL-CIO Pension Fund

CLARENCE RANALLO as Trustee of the IUE AFL-CIO Pension Fund

THOMAS F. LYNCH as Trustee of the IUE AFL-CIO Pension Fund

Defendants:

THOMAS HERRMANN

LOCKE MOWERS INC.

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THOMAS HERRMANN,

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IUE AFL-CIO PENSION FUND AND LLOYD J. HAYES, PETER S. DICICCO, SAL T. INGRASSIA, JOHN S. VOZELLA, CLARENCE RANALLO, AND THOMAS F. LYNCH as Trustees of the IUE AFL-CIO Pension Fund,

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled matter on November 19, 1993, and the order of that court entered on March 23, 1994, denying a petition for rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals in this matter is reported at 9 F.3d 1049 and is reprinted in the Appendix to this petition (1a).[1] (The order denying rehearing

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[1] References in this petition appear as follows: To the numbered pages of the Appendix to this petition: (——a); to the numbered pages of the Joint Appendix filed in the Court of Appeals: (—— JA).

and the Court of Appeals' mandate are not reported but are printed in the Appendix at 26a and 28a respectively).

The memorandum of decision of the United States District Court for the District of Connecticut written by Magistrate Judge Latimer and affirmed and adopted by United States District Judge Daly was not reported but is reprinted in the Appendix at 20a.

JURISDICTION

The Court of Appeals for the Second Circuit entered judgment in this matter on November 19, 1993. Petitioner filed a petition for rehearing with a suggestion for rehearing *en banc* which the Court of Appeals denied by order dated March 23, 1994. Petitioner invokes the jurisdiction of this Court to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(a).

STATUTES INVOLVED

Title 29, United States Code, Section 1451

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the

employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

Title 29, United States Code, Seciton 1392

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

STATEMENT OF THE CASE

Plaintiffs are comprised of a pension fund (the "Fund") and six trustees who administer it. (73 JA). The first defendant, Locke Manufacturing, Inc. ("Manufacturing") was a company located in Connecticut and

was a party to the union agreement involving the pension fund and the employer of the covered union employees. (73-74 JA). Manufacturing was obligated, pursuant to a collective bargaining agreement with a local union affiliated with the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, to contribute to the Fund on behalf of its employees. (74 JA). The second defendant, Thomas Herrmann, was a shareholder and officer of Manufacturing. (74 JA).

In April 1990, the third defendant, Locke Mowers, Inc. ("Mowers"), a Georgia corporation, entered into an agreement (the "Acquisition Agreement") with Manufacturing and Defendant Herrmann. (78 JA). Defendant Herrmann agreed to provide consulting services and entered in an agreement not to compete with Mowers, as well as a one-year employment agreement. (79-80 JA). Herrmann was to receive pay from Mowers as well as a signing bonus. (78-79 JA).

By selling its assets to Mowers, Manufacturing effectively ceased its operations, thereby bringing an end to its obligation to contribute to the Fund. (3-4 JA). Under ERISA, Manufacturing's withdrawal from the Fund triggered its obligation to pay the Fund "withdrawal liability." (4 JA). Plaintiffs sent a notice demanding that Manufacturing pay the withdrawal liability, but no payment was made. (75-76 JA). When payment was not made, suit was commenced against the three defendants. The initial complaint was dismissed and the First Amended Complaint was the subject of a motion to dismiss when it was voluntarily amended.

The Second Amended Complaint alleges seven claims for relief, five of which are directed against Defendant Herrmann.[2] Each of the claims against Defendant Herr-

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[2] Plaintiffs' First Claim is asserted against Manufacturing. They allege Manufacturing was a party to the collective bargaining

mann involve factual allegations that, knowing the withdrawal liability of Manufacturing would be triggered by its sale of assets, Herrmann paid himself excessive salary or bonuses, that he entered into an employment agreement and covenant not to compete with Mowers (79-80 JA), and that he structured the sale of Manufacturing's assets to deplete the assets of the company. (80 JA). The complaint then asserts a wide variety of claims against Defendant Herrmann for this conduct.

In the Second Claim, Plaintiffs allege that these actions of Defendant Herrmann constitute an illegal distribution or dividend under Delaware corporate law and fraud upon the creditors of Manufacturing under Delaware law. (80-81 JA).

The Third Claim alleges that certain monies were received by Defendant Herrmann without any "substantial consideration" and "constitute a fraudulent conveyance under Connecticut law." (81 JA).

Plaintiffs' Fourth Claim asserts Defendant Herrmann is an employer under the provisions of ERISA, 29 U.S.C. § 1002(5), and liable for statutory withdrawal liability because Defendant Herrmann was the sole shareholder of Manufacturing. (81-82 JA).

The Fifth Claim alleges that the manner in which Defendant Herrmann and Mowers structured the sale of Manufacturing's assets deprived Manufacturing of assets from which Plaintiffs could seek payment of withdrawal liability. (82 JA).

Plaintiffs' Sixth Claim asserts that Defendant Herrmann and Mowers "defrauded" Plaintiffs by sending a notice of sale known to be false. (84 JA).

In their Second Amended Complaint, Plaintiffs allege subject matter jurisdiction over the claims against De-

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agreement and is liable under 29 U.S.C. § 1383(a)(1) for statutory withdrawal liability. (74-75 JA). Plaintiffs subsequently voluntarily withdrew all claims against Manufacturing.

fendant Herrmann solely on the basis of ERISA jurisdictional fonts (29 U.S.C. § 1132 and § 1451), diversity of citizenship and pendent jurisdiction. (72 JA). In their brief before the Court of Appeals, Plaintiffs conceded that no basis existed for a claim to jurisdiction on diversity grounds.

On January 17, 1991, Defendant Herrmann filed a motion to dismiss the claims of the Second Amended Complaint directed against him. Defendant Herrmann claimed the Connecticut District Court lacked subject matter jurisdiction and that each of the claims alleged failed to state a cause of action. The motion was transferred to Magistrate Judge Latimer.

Magistrate Judge Latimer, after hearing argument on the motions, issued his recommended ruling on pending motions on December 7, 1992. (199 JA). *Inter alia*, he ruled that subject matter jurisdiction over the claims against Defendant Herrmann did not exist as he was not an "employer" for purposes of the Multiemployer Pension Plan Amendment Act ("MPPAA"). (202-203 JA). Due to the dismissal of the federal claims and the lack of another jurisdictional basis, the pendent claims were dismissed. (203 JA). United States District Judge Daly affirmed and adopted the ruling of Magistrate Judge Latimer on March 29, 1993. (206 JA).

An appeal was taken by Plaintiffs from the decision of the District Court to the Second Circuit Court of Appeals. On November 19, 1993, the Second Circuit Court of Appeals entered its decision affirming in part and overruling in part the decision of the District Court. Though numerous issues were addressed by the Circuit Court, the issue here questioned is the determination of the Circuit Court that jurisdiction over the claims asserted by the Fund existed because the appellants had stated a colorable federal claim. The Circuit Court found a "colorable federal claim" to have been stated under the "liberally-construed Fifth claim of the Complaint." (11a).

It is this portion of the Second Circuit's decision that gives rise to this appeal. Petitioner challenges the finding of federal jurisdiction under ERISA on the basis of allegations that he participated in a scheme to deplete the assets of a corporation which was an employer subject to withdrawal liability.

REASONS FOR GRANTING THE WRIT

The fundamental flaw in the decision below is that clear language limiting the jurisdiction of the federal district court has been radically redefined by what, in effect, is the creation of a new right of action under ERISA. That new right of action is deemed necessary to accomplish a purpose, which purpose is found only by strained implication in the language of 29 U.S.C. § 1392(c).

The reasons this result is improper are several: First, the decision creates a right of action under ERISA against a limitless and undefined class of persons. Second, it implies a federal right of action based upon an interpretation of § 1392(c) which is faulty. Third, the newly created right of action is totally unnecessary and duplicative of existing remedies and will require the judicial creation of elusive standards inconsistent with traditional rules on what transfers of an obligor may be avoided by creditors.

I. THE CIRCUIT COURT'S DECISION IMPROPERLY IMPLIES A RIGHT OF ACTION AGAINST PARTIES NOT SUBJECT TO ANY ERISA OBLIGATION.

The claim of the Plaintiffs is for collection of the withdrawal liability. Defendant Herrmann is alleged to have been an officer/shareholder of a corporation (Locke Manufacturing) which was the employer and participant in a multiemployer pension plan. Defendant Herrmann is not alleged to have been the employer. Defendant Herrmann argued that, as an individual officer/shareholder, he had no responsibility for payment of the withdrawal liability. The decision of the district court agreed that Herrmann

was not liable as an employer (22a). This point is well-founded upon decisions from other district and circuit courts and remains undisturbed by the decision of the Circuit Court.

The Second Amended Complaint asserts Defendant Herrmann is liable under the MPPAA as well as under traditional state common law and statutory forms of liability (such as fraudulent conveyances, excess dividends, etc.). Although a series of complaints had originally alleged jurisdiction upon a number of grounds including diversity, by the time of the appeal to the Second Circuit, it was clear that the only basis upon which any subject matter jurisdiction could exist as to the claims against Defendant Herrmann and Co-Defendant Locke Mowers, Inc. was on the basis of 29 U.S.C. § 1451(a)(1). The decision of the Circuit's panel, which focuses only on that jurisdictional statute, reflects an awareness that this statute was the linchpin of Plaintiffs' argument for subject matter jurisdiction in federal court. The Circuit Court did not address or modify the decision of the district court that Defendant Herrmann was not liable as an employer under ERISA. Rather, the Circuit Court went on to explore whether any federal claim could be found against Defendant Herrmann under the MPPAA.

The decision of the Circuit Court examined first the language found in 29 U.S.C. § 1451(a)(1) (1988):

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely effected by *the act or omission of any party under this subtitle with respect to a multi-employer plan,* or any employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(11a) (emphasis supplied in original). The Circuit Court's emphasis of this key phrase should have focused attention on the issue at hand: whether or not Defendant

Herrmann would be a "party under this subtitle." It has never been claimed that Defendant Herrmann was a plan participant, beneficiary or fiduciary of any kind. The only allegation of any duty on his part under the subtitle was the rejected contention that he was liable as an employer. Once that contention was rejected, it was clear Defendant Herrmann had no duty, obligation or liability under ERISA. The decision of the Court of Appeals disregards this key fact, ignores the meaning of the phrase "under this subtitle", and opens up jurisdiction under ERISA to claims against any party.

The decision of the Panel proceeds on the basis that allegations that "Herrmann participated in a scheme, the principal purpose of which was to evade or avoid withdrawal liability by depriving [the corporate employer] of funds sufficient to meet its pension liability," could somehow make Defendant Herrmann a party liable under this subtitle. This reasoning was justified by reference to 29 U.S.C. § 1392(c). The language of that section is as follows:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Focusing principally upon the phrase "and collected" within the parenthetical, the Circuit Court determined that if the liability is to be collected, then transferors who receive assets in a transaction to evade or avoid liability must be before the court. From that assumption, the Circuit Court then redefined "parties under this subtitle" to include any person who was alleged to have received a improper transfer of assets in such a transaction.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set forth the criteria to be used to determine if an implied right of action exists:

(1) Whether the plaintiff is one of the class for whose special benefit the statute was enacted—that is, whether the statute creates a federal right in favor of the plaintiff;

(2) Whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;

(3) Whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff; and

(4) Whether the cause of action is one that is traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. 422 U.S. at 78. Of the four criteria, greater focus is usually placed on the second criteria—Congressional intent. *Karahalios v. National Federation of Federal Employers, Local 1263*, 489 U.S. 527, 532-33 (1989).

In *Mertens v. Hewitt Associates*, —— U.S. ——, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), this Court held that nonfiduciaries, even those alleged to have knowingly participated in a breach of a fiduciary duty imposed by ERISA, are not liable under ERISA. In doing so, the limitations of actions under ERISA were analyzed by this Court. In that analysis, this Court expressed an unwillingness to infer causes of action under ERISA which appears to have been disregarded by the Second Circuit Court of Appeals.

> In *Russell* [*Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)], we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S., at 146-147, 87 L.Ed.2d 96, 105 S.Ct. 3085.

Mertens, 124 L.Ed.2d at 169.

The legislative history of 29 U.S.C. § 1392 indicates that the Congressional intent was to make *employers*

liable for withdrawal liability. *See*, House Report (Ways and Means Committee) No. 96-889(II), 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2992, 3005 ("Under the bill, an *employer* who withdraws from a multiemployer plan generally is liable to the plan for the portion of the plan's unfunded benefit obligations (if any) assigned to the employer.") (emphasis added); House Report (Education and Labor Committee) No. 96-889(I), 96th Cong., 2d Sess. 52, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2920 ("[T]he legislation: . . . (3) requires *employers* who withdraw from a multiemployer plan, or who experience severe declines in their covered operations under the plan, to continue to fund their fair share of the plan's unfunded benefit obligations.") (Emphasis added). Defendant Herrmann is not an employer, *see, Sasso v. Cervoni*, 985 F.2d 49 (2d Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 2964, 125 L.Ed.2d 664 (1993), and the legislative history does not indicate an intent to go beyond employers in collecting withdrawal liability.

II. THE DECISION BELOW IMPLIES A FEDERAL RIGHT OF ACTION BASED UPON A FAULTY INTERPRETATION OF SECTION 1392.

The only basis in the decision of the Second Circuit Court of Appeals for implying a new federal right of action to pursue transferees of assets is based upon the inclusion of the language "and collected" in the parenthetical of § 1392(c). The reasoning of the Panel was that unless parties to whom allegedly improper transactions were made are brought before the court, such withdrawal liability cannot be collected. This reasoning was error. The "and collected" language was intended only to accomplish the apparently unique scheme in the MPPAA wherein liability once assessed against the corporate employer must be paid in regular payments even though the amount or existence of that liability might be contested by the employer. *See* 29 U.S.C. § 1401(d). Section 1392(c) intends only to state that the existence of a

transaction to evade or avoid does not prevent the imposition or the collection of withdrawal liability from the employer. It does not enlarge the definition of responsible parties.

There are three subsections contained in § 1392. The statute in its entirety reads as follows:

> (a) Defintion
>
> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising . . .
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.
>
> (b) Payments of withdrawal liability not considered contributions
>
> Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.
>
> (c) Transactions to evade or avoid liability
>
> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

To understand the meaning of this Section, the Court must recall the manner in which withdrawal liability is triggered. Under 29 U.S.C. § 1381, withdrawal liability arises when an "employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal." A complete withdrawal under § 1383(a) "occurs when an employer: (1) permanently ceases to have an *obligation to contribute* under the Plan. . . ." (emphasis

added). A partial withdrawal under § 1385(a) occurs when, among other things, "(2) there is a partial cessation of the employer's *contribution obligation*." (emphasis added). In short, it is the cessation of the obligation to contribute which determines when withdrawal occurs. Congress clearly anticipated in drafting the MPPAA that employers, particularly corporate employers, might structure transactions so that the obligation to contribute could be found to continue and, thus, defer or postpone into the indefinite future the accrual of withdrawal liability. Section 1392 was designed to prevent employers from circumventing the accrual of the withdrawal liability by improperly contending they were still obligated to contribute to a multiemployer pension plan.

Section 1392(a) first limits what kind of event can create an obligation to contribute and then specifically excludes the obligation to pay withdrawal liability from the definition of the term "obligation to contribute." The effect of that section is to prevent some other form of liability to contribute from being asserted as a basis to prevent the accrual of withdrawal liability.

Section 1392(b) states that "payment of withdrawal liability under this part shall not be considered contributions for the purposes of this part." That is, the fact that payments of withdrawal liability are being made or are due cannot be asserted as obligations to contribute which can defer the withdrawal liability.

Section 1392(c) arose from the same focused intent. The subsection functions as a catch-all provision designed to deal with the myriad schemes (not yet anticipated by Congress) by which an *employer* could claim the obligation to contribute still continued and thus postpone the accrual of withdrawal liability. No scheme or device of an employer to prolong an obligation to contribute can be created as a basis to avoid or evade liability.

With the intent of Congress in enacting § 1392 in mind, the use made of it by the Circuit Court is demonstrably

incorrect. The facts in this case do not allege that any of the transactions or transfers alleged by Plaintiffs had the purpose "to evade or avoid liability under this part." No one has argued that Locke Manufacturing's liability as the employer was in any way effected by any of the transactions in question. Indeed, every complaint filed has affirmatively alleged the corporate employer has always been liable for withdrawal liability. The allegations are that Mr. Herrman's actions affected the ability of the corporate employer to satisfy such liability. Did Congress intend § 1392 to create a new federal right of action against limitless classes of defendants for transactions which negatively impact an employer's ability to pay withdrawal liability?

The ability of an employer to satisfy withdrawal liability is simply not the subject matter of any provision in § 1392. No one argues that § 1392(c) shields fraudulent transactions. Clearly, a multitude of remedies exist to set aside fraudulent conveyances and recover assets. The question is whether § 1392(c) creates a new federal right of action if a beneficiary alleges that some distribution was made for the purpose of preventing payment of withdrawal liability.

III. THE DECISION BELOW CREATES A NEW UNNECESSARY FEDERAL RIGHT OF ACTION ENTIRELY DUPLICATIVE AND POTENTIALLY INCONSISTENT WITH EXISTING CREDITORS' REMEDIES.

Not only does the Panel's interpretation of § 1392 run contrary to the clear and definitive language in § 1451, but it is also totally unnecessary. As Plaintiffs' Amended Complaint itself shows, more than adequate remedies at law are available against any party who is alleged to have received an improper transfer. These remedies include fraudulent conveyance statutes, corporate statutes limiting dividends and distributions and the comprehensive and thorough protection of the federal bankruptcy

statutes. The only benefit to this interpretation of § 1392(c) is the tactical benefit of a new threat which can be used in the negotiation for payment of withdrawal liability when that negotiation is being made with the shareholders/officers who will become targets of claims of improper distributions unless they agree to the demands of Plan beneficiaries.

Another difficulty with the Circuit Court's interpretation of § 1392(c) is how the basis of transferee liability will be determined. Under traditional fraudulent conveyance statutes and preference statutes, it is the fair value of the consideration exchanged which determines whether the exchange is valid. Under the statute on which Plaintiffs rely, the appropriateness, reasonableness or fairness of the transaction does not appear to be relevant. Rather, it is the purpose of the transaction. If the decision of the Circuit Court below remains in force, different rules will be applied for different groups of creditors. Creditors who asset a claim for withdrawal liability will proceed under this new (and yet to be written) body of law. All other creditors will not. Can this be what Congress intended by § 1392(c)?

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 360—August Term, 1993

(Argued September 13, 1993
Decided November 19, 1993)

Docket No. 93-7384

IUE AFL-CIO PENSION FUND; LLOYD J. HAYES; PETER S. DICICCO; SAL T. INGRASSIA; JOHN S. VOZELLA; CLARENCE RANALLO; THOMAS F. LYNCH, as Trustees of the IUE AFL-CIO Pension Fund,

Plaintiffs-Appellants,

v.

THOMAS HERRMANN; LOCKE MOWERS, INCORPORATED,

Defendants-Appellees.

Before OAKES, *Senior Circuit Judge*, MAHONEY, *Circuit Judge*, and MISHLER, *Senior District Judge.**

Pension Fund appeals an order entered by the District Court for the District of Connecticut, T.F. Gilroy Daly, *Judge*, having adopted Magistrate Judge Arthur H. Latimer's report and recommendation to dismiss the Pension Fund's complaint and denying Pension Fund's request for injunctive relief.

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* The Honorable Jacob Mishler, *Senior District Judge*, Eastern District of New York, sitting by designation.

Held: There is jurisdiction over the federal claims because the Appellants have stated a colorable federal claim; there is personal jurisdiction as to the federal claims pursuant to the nationwide service of process provision of the federal statute; there is jurisdiction over the state law claims pursuant to the doctrines of pendent and pendent personal jurisdiction because the federal and state claims derive from a common nucleus of operative fact; the district court incorrectly dismissed the claims because the fraud claims alleged in the Complaint are legally sufficient to survive the specificity requirements of Rule 9(b) and a Rule 12(b)(6) motion to dismiss; the district court properly denied injunctive relief.

OAKES, *Senior Circuit Judge*:

Plaintiff/Appellant, IUE AFL-CIO Pension Fund, a multiemployer, union pension fund, and its trustees (collectively the "Fund") appeal an unpublished order of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Judge*, adopting Magistrate Judge Arthur H. Latimer's report and recommendation to dismiss the Fund's second amended complaint ("SAC" or the "Complaint") for failure to plead fraud with particularity, lack of federal jurisdiction, and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 9(b), 12(b)(1), and (6).[1] Given the procedural context of this case, we are required to address several distinct jurisdictional questions—whether the Fund timely filed objections to the magistrate judge's report and recommendation, whether a final judgment is before this court, whether the district court properly dismissed the Fund's federal claims pursuant to Rules 9(b)

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[1] The defendants also have asserted that the court lacked personal jurisdiction under Fed. R. Civ. P. 12(b)(2). It is unclear from the magistrate judge's report and recommendation whether the complaint was dismissed for lack of personal jurisdiction as well.

and 12(b), and whether the district court had pendent [2] jurisdiction over the state law claims. We are also asked to rule on the Fund's request for injunctive relief pursuant to 29 U.S.C. § 1399(c) (1988). We conclude that timely objections to the magistrate judge's report and recommendation were filed, there is a final judgment before this court, and the district court had jurisdiction over the federal claims and pendent jurisdiction over the state law claims. We therefore reverse the district court's dismissal of the Complaint, affirm the district court's denial of the Fund's request for injunctive relief, and remand for further proceedings.

I.

Standard of Review

When an appeal comes before this Court on a motion to dismiss, we accept as true the factual allegations of the Complaint. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau Inc.*, 476 U.S. 409, 411 (1986);

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[2] Supplemental jurisdiction, 28 U.S.C. § 1367(a) (Supp. II 1990), which codifies the common law doctrine of pendent jurisdiction, does not apply in this case because Section 1367(a) "shall apply to civil actions commenced on or after [Dec. 1, 1990]." Pub. L. No. 101-650 § 310(c), 104 Stat. 5114 (1990). Although the Fund filed the SAC on December 27, 1990, after the effective date of section 1367, the Fund filed the original complaint on February 7, 1990, prior to the effective date. "An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). In this case, thhe SAC is merely an "elaboration of plaintiffs' pleadings." *See* District Court's endorsement of the Fund's Motion to Permit Plaintiffs to File and Serve SAC. Therefore, the December 27, 1990 filing date of the SAC relates back to the February 7, 1990 filing date of the original complaint. Consequently, we rely on the doctrine of pendent jurisdiction as articulated in *United Mine Workers of America v. Giggs*, 383 U.S. 715, 725-727 (1966), and its progeny. In any event, an analysis under section 1367(a) would not alter our analysis.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). In considering such motions, we must read the Complaint liberally, drawing all inferences in favor of the pleader. *See, e.g., Scheuer*, 416 U.S. at 236; *Conley*, 355 U.S. at 45-46; *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989). Moreover, "[t]he district court should deny the motion [to dismiss] unless it appears to a certainty that a plaintiff can prove no set of facts entitling him to relief." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). This general rule applies even when fraud is pleaded. *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990) ("[w]hen a fraud is asserted, the general rule is simply applied in light of Rule 9(b)'s particularity requirements.").

II.

Factual Allegations

Taking as true the afctual allegations specified in the Complaint, the Fund seeks recovery of major Fund debts and obligations owed to it by co-Defendants/Appellees, Locke Manuafcturing, Inc. ("Manufacturing"), Thomas Herrmann, and Locke Mowers, Inc. ("Mowers"). Herrmann has been the president and sole shareholder of Manufacturing since 1986 when he purchased all of its stock pursuant to a Stock Purchase Agreement dated October 1, 1986, an agreement "binding upon and inur-[ing] to the benefit of the parties hereto and their successors and assigns." *See* SAC, Exhibit C, Stock Purchase Agreement Among Tippecanoe Management Corp., Michael A. Goodman and Thomas A. Herrmann, dated as of October 1, 1986, § 10.7. Pursuant to a collective agreement, Manufacturing was obliged, but failed, to make contributions to the Fund. At such time, Herrmann was "fully aware of an unfunded accrued liability with

respect to the IUE AFL-CIO Pension Plan." *Id.* at § 3.12(g). "The total estimated amount of unfunded pension liability due to the pension fund at [sic] July 31, 1986 was $476,955." *See* SAC, Exhibit B at 7.

On November 10, 1988, Mowers, through its corporate parent Elswick, PLC, offered to acquire the business and certain assets of Manufacturing for a stated consideration of $400,000. *See* SAC, Exhibit D. On April 10, 1989, Mowers, Manufacturing and Herrmann entered into the acquisition agreement pursuant to which Mowers purchased Manufacturing's assets, but did not assume liability "actual or contingent, whatsoever, including, without limitation, for any withdrawal liability of Seller under any multiemployer pension plan." *See* SAC, Exhibit E at 5. Moreover, the Fund alleges that the parties dropped the purchase price to $350,000 and gave Herrmann a $50,000 signing bonus instead. It is also alleged that Herrmann received a one year service arrangement for $75,000 and over $370,000 payable over three years for a covenant not to compete. Prior to the asset sale, Herrmann used a Manufacturing line of credit to pay himself an extra bonus of more than $250,000. These transactions allegedly rendered Manufacturing insolvent.

On May 9, 1989, Manufacturing ceased operations and effectuated a complete withdrawal from the Fund. On October 27, 1989, the Fund sent a written demand to Manufacturing for payment of withdrawal liability amounting to $638,098.

III.

Dismissal of the Complaint

Herrmann and Mowers moved to dismiss the Complaint. Reading the Complaint liberally, the Complaint states (1) a federal claim as against all defendants under ERISA's Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381, 1383, 1391 (1988), which imposes "withdrawal liability" when an "em-

ployer," in going out of business, effectively "withdraws from a multiemployer plan" like the Fund, *see* SAC claims 1, 4; and (2) a federal claim as against all defendants under 29 U.S.C. §§ 1451(a)(1), 1392(c) (1988), which imposes liability on any party who has attempted to "evade or avoid liability" under the MPPAA and whose acts have "adversely affected" a pension fund, *see* SAC, claims 1, 4 and 5. The Complaint also states (1) a Delaware state law illegal distribution fraud claim against Herrmann, *see* SAC, claim 2, (2) a Connecticut state fraudulent conveyance claim, *see* SAC, claim 3 and (3) a Connecticut state law claim for failure to comply with Article 6 of Connecticut's U.C.C., Bulk Transfer Act, Conn. Gen. Stat. § 42a-6-101 *et seq.*, which imposes liability on debtors who fail to give notice to credtitors upon a bulk sale of the debtor's assets and, in some instances, ensures that the money paid to the indebted seller is applied to pay the seller's debts, *see* SAC, claims 6 and 7. These state law claims all derive from the same circumstances that gave rise to the federal claims. In support of all their claims, the Fund attached eight exhibits elaborating the factual allegations of the Complaint.

The magistrate judge recommended dismissal of the Complaint for a variety of reasons. According to the magistrate judge's report: (1) neither Mowers nor Herrmann can be construed to be an employer under the MPPAA; (2) fraud allegations were not pleaded with particularity; (3) the Fund mistakenly invoked the court's diversity jurisdiction for a number of the state law claims;[3] (4) with the dismissal of the federal law claims, discretionary pendent jurisdiction should not be exercised; (5) even if a federal claim is recognized, the pendent state law claims should be dismissed because they are disproportionate in number; and (6) the request for interim quarterly payments of the withdrawal liability

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[3] All parties now concede that there is no diversity jurisdiction.

is a unique request for which there is no statutory authority.

On appeal, the defendants question the timeliness of the appeal and this court's appellate jurisdiction.

IV.

Timeliness of Appeal

Herrmann argues that the Fund's objection to the magistrate judge's report and recommendation was not timely and therefore must not be considered. *See Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988) (citing *McCarthy v. Manson*, 714 F.2d 234, 237 & n.2 (2d Cir. 1983); *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 29-30 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979)).

A party may request a judge to reconsider a magistrate judge's report and recommendation within ten days of being served with a copy of the order. 28 U.S.C. § 636 (b)(1) (1988). A failure to file timely objections to a magistrate judge's report and recommendation may be fatal. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985) (court of appeals may deny review to a petitioner who "was notified in unambiguous terms of the consequences of a failure to file, and deliberately failed to file nevertheless"); *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir.) (holding that petitioner's failure to file timely objections to magistrate judge's report and recommendation barred further judicial review and no circumstances warranted excusing the default in the interests of justice), *cert. denied*, —— U.S. ——, 113 S. Ct. 825 (1992); *Small v. Sec'y of Health & Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam) (confirming previously stated rule that "failure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision," although holding that this

rule does not apply to *pro se* parties unless the "magistrate's report explicitly states that failure to object to the report within ten (10) days will preclude appellate review and specifically cites 28 U.S.C. § 636(b)(1) and [Fed. R. Civ. P.] 72, 6(a) and 6(e)").

Applying the normal rules guiding the timeliness of appeals, the Fund had 10 days to file and serve objections after the magistrate judge's order was entered (December 10, 1992). Day 1 was the day after entry or December 11. Because the time period involved is less than 11 days, intermediate Saturdays, Sundays and legal holidays do not count. Fed. R. Civ. P. 6(a). Finally, Fed. R. Civ. P. 6(e) provides for an additional three days where service is by mail, as is the case here. *See, e.g., Nalty v. Nalty Tree Farm*, 654 F. Supp. 1315, 1317-18 (S.D. Ala. 1987) (applying above analysis).

A simple glance at a December 1992 calendar confirms that the Fund had until December 30, 1992 to file objections. The Fund filed objections on December 28. Thus, the Fund made timely objections to the magistrate judge's report and recommendation.

V.

Appellate Jurisdiction

Herrmann argues that this court lacks appellate jurisdiction because the Fund filed a notice of appeal before a final decision of the district court had been rendered. 28 U.S.C. § 1291 (1988). However "a premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice." *Welch v. Cadre Capital*, 923 F.2d 989, 992 & n.1 (2d Cir) (citations omitted) (noting *Yaretsky v. Blum*, 592 F.2d 65, 66 (2d Cir. 1979) ("the better rule is that in the absence of prejudice to the appellee, the court should treat a premature appeal

as from a final judgment so as to avoid denial of justice, expense, and inconvenience.")), *vacated on other grounds and remanded sub nom. Northwest Sav. Bank v. Welch*, 111 S. Ct. 2882, *vacated*, 946 F.2d 185 (2d Cir. 1991).[4]

On March 30, 1993, the district court entered an order affirming, approving, and adopting the magistrate judge's report and recommendation of December 7, 1992. On April 8, 1993, the Fund appealed to the Second Circuit. On June 2, 1993, the Fund voluntarily dismissed its cause of action against Manufacturing without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(i). The Fund did not renew its appeal to the Second Circuit after this time.

Under the circumstances surrounding this appeal, the Fund has filed a premature notice of appeal from a non-final order which has now ripened into a valid notice of appeal. Therefore, the notice of appeal, as well as appellate jurisdiction, is valid.[5]

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[4] This Court in *Welch* noted that although "the holding in *Yaretsky* has been superseded by Fed. R. App. Proc. 4(a)(4) as the Supreme Court subsequently noted" [*citing Griggs*], "the philosophy of *Yaretsky*, tolerating a premature notice of appeal, remains valid so long as the notice is not nullified under Fed. R. App. P. 4(a)(4)." *Welch*, 923 F.2d at 992 n.1.

[5] Herrmann argues that the Fund's premature notice of appeal renders it without effect. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 59, 61 (1982) (per curiam) (holding that a notice of appeal filed before the disposition of a Rule 59 motion to alter or amend a judgment shall not have effect). *Griggs* does not apply to this case, however, because *Griggs* involves an interpretation of Fed. R. App. P. 4(a)(4) pursuant to which "[a] notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect." This rule is an exception to the more general rule that "a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." Fed. R. App. 4(a)(2). Rule 4(a)(2) is inapplicable as well because there is not, in this case, a notice of appeal that followed an an-

VI.

Federal Jurisdiction Under Rule 12(b)

Having determined that we have appellate jurisdiction to review the Fund's appeal, we must determine (1) whether the district court had subject matter jurisdiction over the federal claims, Fed. R. Civ. P. 12(b)(1); (2) whether the district court had personal jurisdiction over the defendants, Fed. R. Civ. P. 12(b)(2); and (3) whether the liberally construed allegations made in the Complaint set forth a federal claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6).

A. Subject Matter Jurisdiction

"In determining whether the federal courts have subject matter jurisdiction over a cause of action, a district court must look to the way the complaint is drawn to see if it claims a right to recover under the laws of the United States." *Goldman v. Gallant Sec., Inc.*, 878 F.2d 71, 73 (2d. Cir. 1989) (per curiam) (citing *Bell v. Hood*, 327 U.S. 678, 681 (1946)). "Dismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1280 (3d Cir. 1993) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974)) (internal quotations and other citations omitted); *cf. Van Gemert v. Boeing Co.*, 520 F.2d 1373, 1380 (2d Cir.) (violation of stock exchange rule gave rise to colorable claim under securities laws so as to sustain federal jurisdiction), *cert. denied*, 423 U.S. 947 (1975).

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nounced decision that it subsequently entered. Instead, we have a notice of appeal that followed *entry* of the judgment dismissing the Complaint (but not as to all parties).

The question thus posed is whether the federal MPPAA claim was so insubstantial, implausible, or otherwise completely devoid of merit as not to involve a federal controversy. This is a high burden for the defendants to meet. Under such an analysis, a colorable federal claim has been stated in this case. 29 U.S.C. § 1451 (a)(1) (1988) provides (emphasis added):

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by *the act or omission of any party under this subtitle with respect to a multiemployer plan*, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

Thus, the federal courts have subject matter jurisdiction over "any party under this subtitle" if that party's act or omission adversely affects, among others, any plan participant.

In this case, the Fund, a plan participant, has been adversely affected by the acts of Manufacturing, Mowers and Herrmann. By their actions, as alleged in the liberally-construed Fifth claim of the Complaint (which incorporates by reference the facts alleged in the previous paragraphs), Manufacturing, Mowers and Herrmann participated in a scheme, the principal purpose of which was to evade or avoid withdrawal liabiilty by depriving Manufacturing of funds sufficient to meet its pension liability. *See* SAC, claims 1, 2, 5 and attached exhibits. Section 1392(c) of Title 29 (1988), entitled, "Transactions to evade or avoid liability," provides (emphasis added):

> If a prinicpal purpose of *any transaction* is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined *and collected*) without regard to such transaction.

Reading sections 1451(a)(1) and 1392(c) together, if a pension fund (such as the Fund in this case) is ad-

versely affected by the acts of any party who has attempted to "evade or avoid liability" under the MPPAA (such as Manufacturing Mowers or Herrmann), then the MPPAA shall be applied "without regard to such transaction." To calculate *and* collect liability, "without regard to such transaction," any assets that were transferred in order to "evade or avoid liability," as well as the parties to whom they were improperly transferred, must be within the reach of the statute. Further, to apply the MPPAA "without regard to such transaction," the transferor entity must be deemed to be in possession of improperly transferred assets. Those assets must therefore be recoverable from the parties to whom they have been illegitimately transferred. Those parties thus become "part[ies] under this subtitle" within the meaning of § 1451(a)(1). *Cf. Stotter Div. of Graduate Plastics Co. Inc. v. District 65, United Auto Workers, AFL-CIO*, 991 F.2d 997, 1002-03 (2d Cir. 1993) (upholding an arbitrator's finding that an asset purchaser may be liable for non-ERISA fund contributions as a "successor" even though a corporation that merely purchases another corporation's assets for cash does not normally assume the seller corporation's liabilities).

B. Personal Jurisdiction

Having stated a colorable claim against defendants under the MPPAA, the district court has personal jurisdiction over the defendants insofar as the MPPAA includes a provision for nationwide service of process. *See* 29 U.S.C. § 1451(d) (1988). Moreover, under the doctrine of pendent personal jurisdiction, where a federal statute authorizes nationwide service of process, and the federal and state claims "derive from a common nucleus of operative fact", *see United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), the district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available. *See, e.g., Hargrave v. Oki Nursery, Inc.*, 646

F.2d 716, 719 (2d Cir. 1980) ("by giving jurisdiction over an 'action' to enforce a federal right Congress granted the district courts power also to consider state law claims provided they had a nucleus of pertinent facts in common with a substantial federal claim"); *International Controls Corp. v. Vesco*, 593 F.2d 166, 175 (2d Cir.) (authorizing pendent personal jurisdiction over related state law claims where federal statute invoked is Section 27 of the Securities and Exchange Act of 1934) (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972)), *cert. denied*, 442 U.S. 941 (1979); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 4-5 (D.C. Cir. 1977) (authorizing pendent personal jurisdiction over related state law claims under federal patent statute); *Robinson v. Penn Central Co.*, 484 F.2d 553, 555-56 (3d Cir. 1973) (Securities and Exchange Act); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 528 (8th Cir. 1973) (same); *Schwartz v. Eaton*, 264 F.2d 195, 197-98 (2d Cir. 1959) (Investment Company Act of 1940); Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 Colum. L. Rev. 423 (1970); 2 *Moore's Federal Practice*, ¶ 4.42[1], at 4-524, n.47 (1978); 4A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1125, at 326 (1987 & Supp. 1993). We need not reach the question whether personal jurisdiction as to the state law claims was otherwise available because the district court had personal jurisdiction over the defendants under the MPPAA and the state law claims derive from a common nucleus of operative facts with the federal claims. Accordingly there is jurisdiction over both the federal and state claims as stated in the Complaint.

C. Legal Sufficiency of the Claims

In part VI.A of this opinion, we decided that, for purposes of Rule 12(b)(1), the Fund has asserted a colorable federal claim. However, we have not yet decided whether any of the federal claims asserted sets forth

a federal claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Our inquiry would be over if none of the claims alleged in the Complaint were fraud claims because each claim is legally sufficient to state a claim upon which relief can be granted pursuant to the liberal standard set forth under Fed. R. Civ. P. 8(a) ("short and plain statement of the claim showing that the pleader is entitled to relief"). *See Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990). However, Rule 9(b) requires that the pleader of a fraud claim "state[ ]" "the circumstances constituting fraud . . . with particularity." Fed. R. Civ. P. 9(b). This Court has construed Rule 9(b) to require a complaint alleging fraud to "allege the time, place, speaker and sometimes even the content of the alleged misrepresentation." *Ouaknine v. MacFarlane*, 897 F.2d 75, 79 (2d Cir. 1990) (citations omitted). "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). Thus, "scienter need not be alleged with great specificity." *Ouaknine*, 897 F.2d at 79-80 (citing *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 962 (2d Cir. 1987); *Goldman v. Belden*, 754 F.2d 1059, 1071-72 (2d Cir. 1985)). In fact, conclusory allegations of scienter are sufficient "if supported by facts giving rise to a 'strong inference' of fraudulent intent." *Ouaknine*, 897 F.2d at 80; *Beck*, 820 F.2d at 50; *Connecticut Nat'l Bank*, 808 F.2d at 962.

The specificity required by Rule 9(b) is distinct from Rule 8(a)'s liberal "plain statement" rule. This distinction serves several purposes: (1) "to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based," *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990) (citations omitted); *see also O'Brien v. National Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991); (2) "[to] safeguard[ ] defendant's reputation and goodwill from improvident charges of wrong-

doing," *Ross v. Bolton*, 904 F.2d at 823 (citations omitted); *see also O'Brien*, 936 F.2d at 676; and (3) "to inhibit the institution of strike suits." *Ross v. Bolton*, 904 F.2d at 823 (citations omitted). Nevertheless, Rule 9(b) "must be read together with rule 8(a)." *Ouaknine*, 897 F.2d at 79 (citations omitted); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1298, at 617 (1969 & Supp. 1989).

Moreover, "[d]espite the generally rigid requirement that fraud be pleaded with particularity, allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge." *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990) (citations omitted).

The magistrate judge incorrectly dismissed the Complaint under the Rule 9(b) standard of specificity. Applying the general rule this Court invokes when an appeal comes before us on a motion to dismiss, accepting as true the factual allegations in the liberally construed Complaint, and drawing all inferences in favor of the pleader, *see Ross v. Bolton*, 904 F.2d at 823, we hold that the fraud claims alleged in the Complaint are legally sufficient to survive the specificity requirements of Rule 9(b) and a Rule 12(b)(6) motion to dismiss. Everything necessary to ascertain a federal claim under the MPPAA is in the Complaint and its attached exhibits.

To support its claim that Manufacturing, Mowers and Herrmann structured the asset sale to "evade and avoid" withdrawal liability under the MPPAA, the Fund attaches the documents that structured the asset sale. For example, the Fund, in alleging that Herrmann knew about the withdrawal liabliity, quotes from the Stock Purchase Agreement and includes as exhibits both the Stock Purchase Agreement and associated financial statements. The Fund then alleges how Herrmann and Mowers conspired to avoid withdrawal liability by quoting from specific passages in the Asset Sale Agreement whereby

Mowers could purchase the entire company except for certain liabilities including the withdrawal liability. Moreover, the Fund alleges intent and supports it with quoted passages from signed contracts attached as exhibits. These allegations raise the strong inference that this transaction was not the typical asset sale but one structured to circumvent the mandates of a federal statute and to defraud a pension fund.

Moreover, the Fund was wholly dependent on the defendants' representations to make out its case of fraud. As the Fund was not privy to the negotiation of the asset sale, a more particularized account of the fraud claims could only be established through discovery.

A thorough reading of the Complaint puts the defendant on fair notice both as to the claims and the factual ground upon which the claims are based. Given the standard of review, drawing all inferences in favor of the Fund, we cannot state that it appears to a certainty that the Fund can prove no set of facts entitling it to relief.

To summarize, the Fund has stated a colorable federal claim upon which relief can be granted because (1) the Fund has alleged that Mowers, Manufacturing, and Herrmann structured the asset sale so as to avoid withdrawal liability under the MPPAA and (2) taking the Fund's allegations in the Complaint as true, there is a federal basis upon which the court may grant relief to the Fund. Having so alleged this harm and having stated such claims, the district court has federal question jurisdiction over such claims upon which relief can be granted and personal jurisdiction over the parties for purposes of the federal and the state claims. Fed. R. Civ. P. 9(b), 12(b)(1), (2) and (6). In concluding that there is a viable federal claim, we need not reach the question whether Mowers or Herrmann are "employers" within the meaning of section 1381.

VII.

Federal Jurisdiction of State Law Claims

Several of the claims are based on state law. Once a federal court has federal jurisdiction, it can normally exercise pendent jurisdiction over the state law claims. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (federal court has pendent jurisdiction over state law claims so long as the relationship between the federal and state claims "permits the conclusion that the entire action before the court comprises but one constitutional 'case.' "). *See also Rosado v. Wyman*, 397 U.S. 397, 404 (1970); *see also Cushing v. Moore*, 970 F.2d 1103, 1106 (2d Cir. 1992) (using the same analysis but for supplementary jurisdiction under 28 U.S.C. § 1367 (Supp. 1990)). Furthermore, this Circuit has held that once a claim is sufficient for federal jurisdictional purposes, the state law claims also may be considered. *See, e.g., Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 598 (2d Cir. 1991).

The Supreme Court continually has stated that a federal court lacks jurisdiction to resolve pendent state claims only when the federal question is " 'so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.' " *Hagans v. Lavine*, 415 U.S. 528, 548 (1974) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974)). However, the judicial power of pendent jurisdiction "need not be exercised in every case in which it is to be found to exist. . . . pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justifiaction lies in considerations of judicial economy, convenience and fairness to litigants." *United Mine Workers v. Gibbs*, 383 U.S. at 726; *see also Castellano v. Board of Trustees of Police*

Officers' Variable Supplements Fund, 937 F.2d 752, 758 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 378 (1991).

In this case, the federal and state law claims derive from a common nucleus of opeartive fact. *See Gibbs*, 383 U.S. at 725. All the claims derive from the transaction between Manufacturing, Mowers, and Herrmann (the asset sale purchase), events leading up to this tarnsaction, and events following this transaction. In each instance, these events allegedly tell the story of how the defendants conspired to defraud the pension fund either under the MPPAA or under state law. Therefore, in the interest of justice and judicial economy, the district court should have exercised pendent jurisdiction over the state law claims.

VIII.

Injunctive Relief

The Fund asks us to reconsider its motion to compel quarterly withdrawal liability payments pursuant to 29 U.S.C. § 1399(c) (emphasis added) which expressly states that "an *employer shall* pay the amount determined under Section 1391 of this title . . . ." However, before a court may compel an employer to make interim payments under Section 1399(c), the plaintiff must comply with the statutory notice and demand requirements under Section 1399(b)(1)(A). This gives the employer an opportunity to object to the calculation of interim payments and to furnish additional relevant information. 29 U.S.C. § 1399(b)(2)(A) (1988).

The Fund complied with the statutory notice and demand requirements only with respect to Manufacturing and not with respect to Mowers and Herrmann. *See* SAC, ¶ 17 and Exhibit A. Thus, neither Mowers nor Herrmann was provided with the opportunity to contest the calculation of the withdrawal liability or to have the dispute arbitrated.

More importantly, by the plain language of the statute, only employers are liable for interim payments. However, it has yet to be determined that the defendants were "employers" within the meaning of the MPPAA. This is not a dispute in which an employer admits its obligation to pay withdrawal liability but contests the pension fund's calculations. Rather, the defendants contest the underlying basis for the Fund's attempt to collect withdrawal liability. Under the circumstances, we believe it would be unfair to burden the defendants with an order compelling payment where defendants were not given the opportunity to object to the calculations and especially where the defendants may not be liable at all.

IX.

Conclusion

For the foregoing reasons, we affirm the denial of the Fund's motion to compel defendants to make interim payments pursuant to 29 U.S.C. § 1399(c), but otherwise reverse the judgment and remand to the district court for further proceedings in accordance with this opinion.

[Filed Dec. 7, 1992]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. B-90-57 (TFGD)

IUE AFL-CIO PENSION FUND, *et al.*,
Plaintiffs

vs.

LOCKE MANUFACTURING, INC., *et al.*,
Defendants

RULING ON PENDING MOTIONS

Plaintiffs are a union pension fund and its trustees, essentially seeking recovery of major fund debts and obligations owed by defendant Locke Manufacturing, Inc. ("Locke") incident to Locke's going out of business. Co-defendant Thomas Herrmann was Locke's president and sole shareholder; another co-defendant, Locke Mowers Inc. ("Mowers"), is a new corporation which acquired Locke's assets by contract negotiated among Locke, Herrmann, and Mowers' predecessor, Elswick, PLC. Plaintiffs' second amended complaint alleges in part that the sale of Locke's assets was structured so as to exclude assumption of responsibility for its debts. The final assigned asset price was $350,000.00, with Herrmann also to receive a signing bonus of $50,000.00, a one year service arrangement for $75,000.00, and over $370,000.00 additionally payable over three years for a covenant not to compete; prior to the asset sale, Herrmann also used a bank line of credit to Locke to pay himself an extra bonus of more than $250,000.00. Locke was allegedly rendered insolvent, and plaintiffs question the good faith and adequacy of consideration involved in the transactions.

Or renewed motions by Herrmann and Mowers to dismiss this twice-amended complaint, it should be noted both that compalints are generally read liberally when challenged on their face, see *Scheuer v. Rhodes*, 216 U.S. 232, 236 (1974), and that claimed fraud's circumstances must be alleged with "particularity", Rule 9(b), Fed. R. Civ. P. In this case, plaintiffs have attempted to state a primary federal claim as against all defendants under ERISA, cf. 29 U.S.C. § 1001, *et seq.*—and more specifically, under the Multiemployer Pension Plan Amendments Act (MPPAA or the Act), 29 U.S.C. § 1381, *et seq.*, which imposes "withdrawal liability" when an "employer" like Locke in going out of business effectively "withdraws from a multiemployer plan" like the plaintiffs' fund, 29 U.S.C. § 1381(a). The essential question presented is whether Mowers or Herrmann can also be treated as an "employer" liable to the fund under the Act.

The MPPAA itself does not set forth an express definition of "employer". One cannot simply and automatically borrow definitions from other provisions of ERISA; our court of appeals has concluded that the definition of "employer" for the special purpose of MPPAA withdrawal liability is to be developed by the courts. See *Korea Shipping Corp. v. New York Shipping Ass'n*, 880 F.2d 1531, 1536 (2 Cir. 1989). In the face of an argued more restrictive "common law or dictionary meaning", the Second Circuit has at least endorsed a district court's urged meaning of "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants", *id.* at 1537. Another circuit has suggested that the principle common to *Korea Shipping* and most other authorities imposing withdrawal liability in uncertain "employer" cases is that all defendants held liable for MPPAA purposes had been "contractually bound" in some fashion to make pension contributions. *Seaway Port Authority of Duluth v. Duluth-Superior ILA Marine Ass'n*, 920 F.2d 503, 509 (8 Cir. 1990). If that is so, it would truly be an invented exten-

sion of the statute's reach to include a new and distinct corporate entity like the asset purchaser Mowers in this case, and plaintiffs are better left to other and clearer existing remedies for fraud and the like if any are warranted.

As far as Herrmann is concerned, the sound and ordinary rule consensus would seem that controlling officers and shareholders will not be held liable for MPPAA purposes as an "employer" along with their corporation. See, e.g., *DeBreceni v. Graf Bros. Leasing Inc.*, 828 F.2d 877, 879-881 (1 Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); *Canario v. Lidelco, Inc.*, 782 F. Supp. 749, 756-760 (E.D.N.Y. 1992); cf. also *IUE AFL-CIO Pension Fund v. Locke Machine Co.*, 726 F. Supp. 561, 565-570 (D.N.J. 1989). And while Herrmann presumably had operational control, there is no sufficient indication of an utter disregard of corporate formalities which would traditionally allow piercing of the corporate veil, cf. *Canario, supra* at 759. On the other hand, plaintiffs do in conclusionary terms claim fraud, and the Second Circuit has affirmed trial imposition of personal liability upon a controlling officer and shareholder who had been criminally convicted of fraud in the analogous circumstance of evading benefit fund contribution obligations, cf. 29 U.S.C. § 1145. See *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 387-388 (2 Cir. 1989). Yet that was perhaps the special case, since the fraud was patent and had been judicially established of record. In this present instance of conclusory allegations, more pleaded substance and particularity fairly may and should be demanded, cf. Rule 9(b), *supra*, before considering a novel extension of MPPAA "employer" liability, cf. *Smith v. Ambrogio*, 456 F. Supp. 1130, 1136-1137 (D. Conn. 1978).

Plaintiffs do also allege a number of distinct purported state law claims, mistakenly invoking this court's diversity jurisdiction. There is no such independent jurisdictional basis for those supposed claims, because it is evident that complete diversity is lacking, in that when suit was

brought one plaintiff trustee was a Connecticut citizen and defendant Locke's last principal place of business, cf. 28 U.S.C. § 1332(c), was also in Connecticut, see, e.g., *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 141 (2 Cir. 1991). Suit was commenced prior to the December 1, 1990 effective date of the federal "supplemental jurisdiction" statute, 28 U.S.C. § 1367, so any discretionary exercise of pendent jurisdiction would be governed by previously governing caselaw principles, as in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-727 (1966). With dismissal of the purported federal claims, the state claims should plainly be dismissed, see *id.* at 726. In this case, moreover, the pendent state claims should be dismissed even if a federal claim is recognized, because the state claims are disproportionate in number, and present distinct, controverted issues and potential for confusion. See *id.* at 726-727. If such claims are deemed necessary by plaintiffs, any interest in judicial economy can be better served by state court suit, where both any state law claim and any valid MPPAA withdrawal liability claim can be asserted together as of right. Cf. 29 U.S.C. § 1451(c).

Plaintiffs have additionally moved for court-ordered interim quarterly payments by defendants Herrmann and Mowers as to claimed withdrawal liability, cf. 29 U.S.C. § 1399(c). See, e.g., *DeBreceni v. Merchants Terminal Corp.*, 889 F.2d 1 (1 Cir. 1989). This is a novel request indeed, for there is no authority indicating the MPPAA statute contemplated such an automatic payment duty when one's very identity as a responsible employer is in question. And if the application is a more general equitable relief request, rather than an argued claim of statutory right to interim payments, the request must be denied in any event because there is no showing as required that plaintiffs cannot be adequately compensated ultimately by money damages if they secure a favorable judgment. See, e.g., *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2 Cir. 1979).

Subject to review, cf. 28 U.S.C. § 636(b), defendants' pending motions to dismiss should be granted, and plaintiffs' motion to compel prejudgment payments denied, on the grounds and for the reasons stated above.

Dated at New Haven, Connecticut, this 7th day of December, 1992.

/s/ Arthur H. Latimer
ARTHUR H. LATIMER
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. B-90-57 (TFGD)

IUE AFL-CIO PENSION FUND, *et al.*,

v.

LOCKE MANUFACTURING, INC., *et al.*,

JUDGMENT

This cause came on for consideration defendants' motions to dismiss and plaintiffs' motion to compel before the Honorable Arthur H. Latimer, United States District Magistrate Judge, and

The Court having considered the pending motions and all the papers submitted in connection therewith filed its Ruling on Pending Motions, granting the motions to dismiss and denying the plaintiffs' motion to compel prejudgment payments for the reason stated in its ruling, and the Honorable T. F. Gilroy Daly, United States District Judge having Approved, Affirmed and Adopted Magistrate Judge Latimer's recommended ruling,

It is therefore ORDERED and ADJUDGED that judgment be and hereby is entered in favor of the defendants, in accordance with the Court's order.

Dated at Bridgeport, Connecticut this 30th day of March, 1993.

KEVIN F. ROWE
Clerk

By /s/ Carol E. Cannady
CAROL E. CANNADY
Deputy in Charge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of March one thousand nine hundred and ninety-four.

Docket Number: 93-7384

IUE AFL-CIO PENSION FUND; LLOYD J. HAYES; PETER S. DICICCO; SAL T. INGRASSIA; JOHN S. VOZELLA; CLARENCE RANALLO; THOMAS F. LYNCH, as Trustees of the IUE AFL-CIO PENSION FUND,
Plaintiffs-appellants,

-v.-

THOMAS HERRMANN; LOCKE MOWERS, INCORPORATED,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee Thomas Herrmann,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III
Clerk

By: /s/ Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of November, one thousand nine hundred ninety-three.

Present: HON. JAMES L. OAKES,
Senior Circuit Judge,
HON. J. DANIEL MAHONEY,
Circuit Judge,
HON. JACOB MISHLER,
District Judge.*

Docket No. 93-7384

IUE AFL-CIO PENSION FUND; LLOYD J. HAYES; PETER S. DICICCO; SAL T. INGRASSIA; JOHN S. VOZELLA; CLARENCE RANALLO; THOMAS F. LYNCH, as Trustees of the IUE AFL-CIO PENSION FUND,
Plaintiffs-Appellants,

-v.-

THOMAS HERRMANN; LOCKE MOWERS, INCORPORATED,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ISSUED AS MANDATE. 3-30-94